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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF OKLAHOMA, and
KENNETH A. ELLISON,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

BRIEF OPPOSING MOTION TO DISMISS

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January 19, 1959.

STERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

SUBJECT INDEX

	PAGE
Preliminary Statement	1
Argument	2
I. Substantiality of the Federal Questions	2
II. The Asserted Non-Federal Basis of the Judgement	8
Conclusion	9

INDEX TO AUTHORITIES

CASES:

Application of Peppers Refining Co. (Okla.), 272 P.2d 418, 424	6
Superior Oil Co. v. Corporation Commission, 206 Okla. 213, 242 P.2d 454	4, 7
Wakefield v. State (Okla.), 306 P.2d 305	3

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PRELIMINARY STATEMENT

In their brief in support of the Motion to Dismiss, counsel for Appellees have indulged the same line of illogical approach to the issues as resulted in the apparent confusion of the five members of the Oklahoma Supreme Court who caused rendition of the judgment here on appeal.

Although it is felt that our Jurisdictional Statement anticipated and demonstrated the fallaciousness of the premises upon which those arguments are sought to be founded, a brief summarization of the reasons why the arguments of counsel are unsound should not be amiss.

This summary will be separated into the two topics discussed in the brief in support of the Motion to Dismiss: First, the substantiality of the Federal questions, and Second, the inevitability of the adequate Federal questions involved in the State Court judgment.

ARGUMENT

I.

Substantiality of the Federal Questions

In their approach to their argument, counsel seek to oversimplify the issues by the statement that Appellant questions the authority of a regulatory body of the State of Oklahoma "to regulate the drilling of a well for oil and gas into a common source of supply" (Motion to Dismiss, p. 6). And, they then present an extended list of States wherein well-spacing and pooling statutes have been enacted and upheld.

Such an approach is neither a fair statement of the issues, nor are the obvious implications of the "roll-call of States" anything other than an attempt to pervert our position by innuendo.

In our Jurisdictional Statement, page 21, it was quite clearly stated that Appellant *does not challenge either the propriety or legality of conservation legislation of this sort.* Our objection is to this particular attempted extension of legitimate regulatory authority—an expansion of governmental regulations founded upon the laudable objective of "conservation" into an entirely new field, the compulsory participation in exploration.

Of the numerous decisions cited by counsel in support of the constitutionality of well-spacing and pooling legislation, all except one—*Wakefield* v. *State*, 306 P.2d 305—*limit their consideration solely to the conservation aspects of the legislation.* None, except the *Wakefield* case, indicate that any of the courts ever anticipated that the legislation they were approving would be extended to the promotion of any objective other than conservation. *And the Wakefield decision, by the Oklahoma Supreme Court, was founded solely upon its decision in the instant case on appeal.*

An analytical examination of the positions taken by the Appellant and the Appellees will show that Appellees, rather than supporting the principle of spacing units as a vehicle of conservation, actually are seeking to destroy its efficacy for such purposes. While, on the other hand, Appellant is relying upon the validity of the legislation establishing the unit as the very foundation of his contentions.

Seizing upon the pure coincidence that the location designated by the Commission for the single well authorized for the unit happened to be on Ellison's small portion of the unit, Appellees' arguments, and the Oklahoma Supreme Court's opinion, erroneously treat the well as *Ellison's well.* Such a construction of pooling legislation would destroy the very essence of its objectives.

The wording of the law, and its prior construction by the Oklahoma court, make it clear that any well drilled on the unit *belongs to the several interest-owners in the unit,* and the operator is merely one interest-owner desig-

nated by the Commission to be permitted to develop *the unit*.

The ownership of the leasehold overlying the portion of the unit fixed as the proper well-site is not the determining factor in designation of the operator. In the case of *Superior Oil Company* v. *Oklahoma Corporation Commission*, 206 Okla. 213, 242 P.2d 454, the Commission was dealing with a situation where two interest-owners both were seeking designation as the sole operator; and one interest-owner was given authority to drill on the leasehold surface of another interest-owner.

In this case, assuming that Anderson had sought the right to drill, had shown his superior experience to Ellison as an oil operator, his greater financial resources to enable him to "carry" dissenting interest-owners, his greater *quantum* of interest in the unit than Ellison's and other pertinent facts that would have rendered it unreasonable for the Commission not to select him as the operator instead of Ellison, the mere fact that the designated well-site was on a portion of the unit leased to Ellison still would have required an order that Anderson drill the unit well at the designated location. And, it would not have been *Anderson's well;* but the well of *all of the unit interest-owners*, whether or not they actively participated in the drilling operations.

That absolutely essential component of the mechanics of pooling regulation was recognized by the Oklahoma court in its opinion in the *Superior Oil Company* case, *supra;* and that recognition in itself distinguished the legal principles involved in pooling from those involved in the

municipal zoning decisions which we discussed in the Jurisdictional Statement.

If the position of the Appellees, and that used by the Oklahoma court in this case, were correct—and the well should be considered Ellison's well merely because it is located on his part of the surface of the unit—the entire power of the Commission to designate a suitable operator would be aborted. For the Commission's power would be subject to the veto or acquiesence of the owner of the tract on which the well-site was designated, or the Commission would be obliged to designate a new site which would result in uneconomic production from the common source of supply.

Our thesis here, as to the legal effect of pooling regulation, is the only basis on which it logically can be sustained. But, if the theory advanced by Appellees should be adopted to support the entirely radical extension of police power of compelling an interest-owner in a unit to become a mining co-partner of a co-owner, or to forfeit his rights in the production from a predetermined "common source of supply", then the elementary foundation for sustaining the legality of pooling regulation must be discarded, and pooling regulation rendered logically invalid in favor of the new objective—"encouragement of development."

Appellees, and the author of the Oklahoma court opinion, dwell upon what they consider the inequity of permitting a co-tenant in a unit to "sit back" and let another develop the unit, carrying the entire risk of the loss of money the latter expends. Such a consideration involves

the application of fundamental concepts of the science of justice—of established principles which constitute "due process of law."

The conflict of correlative rights and obligations of joint owners of property—particularly of co-tenants—has resulted in the development of the long-established rule of law that essential justice is dispensed by allowing a co-tenant to develop the jointly-owned property at his will but granting to him a lien upon the rents and profits he produces for a non-participating co-tenant until he is repaid for his expenditure. Such a solution of the possible conflict of rights is provided by the very statute here under consideration; and such a solution does no violence to the vested property rights of either co-tenant.

As was said by the Oklahoma Supreme Court itself in the case of *Application of Peppers Refining Co.*, 272 P.2d 416, 424:

> "In our opinion it is more important to secure to each lessor, lessee, and owner of mineral rights in a field, his ratable share of the production therefrom and to prevent underground waste, than it is to secure to some the maximum profits from drilling and producing operations."

The only reasoning by which the judgment of the lower court, in this case, can be rationalized is by a complete departure from that traditionally and firmly established tenet of property rights, by the abandonment of "due process of law" in favor of a "*new* process of law."

Our contentions *in seeking review* are not predicated upon the proposition that the statute here involved actually contains no language to give warrant for this unprecedented

extension of the police power into fields remote from and inimical to restricting mineral production. Nor is capital sought to be made of the fact that this new legislation actually dates from the rendition of the judgment of the Oklahoma court in this case, since the *Superior Oil Company* case, *supra*, had recognized a relationship of cotenancy to exist between the unit interest-owners under the statute *as then construed by the Court.*

It is recognized that a party has no vested right in a judicial decision, or any right of constitutional complaint at a change of judicial viewpoint, even when it results in the practical amendment of a State statute.

But, from the standpoint of review in this Court of the validity of legislation heretofore sustained as a legitimate exercise of the police power in implementation of *conservation,* when the objective of the police power is changed to that of *"encouragement of development"*, and the governmental action is of a nature wholly unrelated to restriction of production, rendering the reasoning of all prior decisions rationally inapplicable, the new and vitally substantial Federal questions thereby presented are of a nature entirely worthy of plenary consideration on their own merits.

The Federal questions we seek to present to the Court in this appeal generically are threefold (although subdivided in their presentation in the Jurisdictional Statement): *First*, that the police power—although *virtually* all-encompassing—still cannot justify a governmental attempt to deprive a person of his liberty to refrain from contracting (a) to become a partner in another's specula-

tive enterprise or (b) to lease to another a valuable property right; *Second*, that the police power—although *virtually* all-powerful—cannot justify a governmental attempt (a) to take $55,000.00 of a person's money to aid in another's speculation or (b) to take from him a valuable property right for another's private use, regardless of the compensation; and *Third*, that the objective of "encouragement of development", as distinguished from restriction of production in the interest of "conservation", is supported by no reasonable or legitimate public purpose of an urgency which would justify such a violation of traditional personal and property rights.

Whether or not this Court ultimately should resolve those questions in the affirmative, they hardly could be dismissed as unsubstantial in view of the many decisions of this Court on the merits of similar presentations of like challenges to other legislation.

II.

The Asserted Non-Federal Basis of the Judgment

The arguments of Appellees on this ground of their Motion to Dismiss are not quite clear. They appear to be predicated on the theory that our complaint is to the *action* of the Corporation Commission rather than to the *statute* itself. For, emphasis is made on the wording of the statute which empowers the Commission to require pooling "upon such terms and conditions as are just and reasonable", etc.

However, counsel for the Appellees appear to have overlooked, or to have studiously ignored the statement made on page four, and the parenthetically emphasized premise to the statement of the "Questions Presented by the Appeal" (on page 6) of our Jurisdictional Statement.

We well might have attacked the Commission's alternative order as unjust and unreasonable. In that event, there would have been drawn in issue the validity of the *actions* of the Commission as *unauthorized* by the statute.

But the Supreme Court of Oklahoma, in its judgment as declared by the first syllabus of the opinion (Appendix A, page i, Jurisdictional Statement) held that *the statute authorized* the precise order made by the Commission in this proceeding. Hence, the validity, under the Federal Constitution, of the *actions* of the Commission were relegated to a position of secondary importance by the State court's construction of the *scope of the statute itself*. And, in so doing, the State court, in its second syllabus, recognized the transcendency of the Federal questions inherent in its decision.

CONCLUSION

Believing that further repetition of the matters treated in the Jurisdictional Statement would serve no useful purpose of the Court, it is respectfully urged that the Motion

to Dismiss be denied and that probable jurisdiction be noted to enable more detailed presentation of the Federal questions herein.

Respectfuily submitted,

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